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No. 81-2341

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

HARVEY KUDLER and MARCIA KUDLER,

Petitioners,

vs.

MALLORY IRA SMITH,

Respondent,

and regarding,

BRIAN ALEXANDER SMITH and
VANESSA LAUREN SMITH,

Children.

PETITIONERS' REPLY MEMORANDUM ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF COLORADO

I. STANLEY STEIN
Attorney for Petitioners
1365 East 13th Street
Brooklyn, N.Y. 11230
(212) 376-1231

TABLE OF CONTENTS

	PAGE
Jurisdiction in this Court is disclosed in the "Order" issued by Hon. Joseph P. Lewis, District Judge, Jefferson County, Colorado, on December 5, 1979	2
Cases Cited by Respondent fail to show any jurisdictional Bar on Facts, or in law, for granting certiorari, in this Court	3
28 U.S.C. 1738A is relevent for consideration in this Court in the case at bar	6
Conclusion	8

INDEX TO APPENDIX

		PAGE
Appendix Q	- Reporter's Transcript of hearing held on December 5, 1979, culminating in "Order" of Hon. Joseph P. Lewis	87a
Appendix R	- Kudler v. Smith July 9, 1979 71 AD 634 (Second Series	103a

TABLE OF AUTHORITIES

Cases

Bradley v. Richmond School Board, 416 U.S. 696, 711	7
Halvey v. Halvey, 330 U.S. 610, 614, 619, 620	4, 5, 7
Kudler v. Smith, July 9, 1979 71 AD 2d 634	3, 4
Lorillard v. Clyde et al, 122 N.Y. 498, 502	5
United States v. Alabama, 362 U.S. 602, 604	7
Zifferin, Inc. v. United States, 318 U.S. 73, 78	7

PAGE

Other

V.5B-C.J.S. Appeal & Error 1841, pp. 244-245 7

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PETITIONERS' REPLY MEMORANDUM ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEARLS FOR THE STATE OF COLORADO

Petitioners Harvey Kudler and Marcia Kudler submit this brief in reply to the brief of respondent in opposition to their petition for a Writ of Certiorari.

(a)

At no point in respondent's brief does respondent dispute the "Order" of Hon. Joseph P. Lewis, on December 5, 1979, cited in petitioners' brief with respect to how the Federal question was raised in the State of Colorado (Pet. Br., pp 6, 10).

Said "Order" is reproduced in full, as Petitioners' Appendix Q, infra pp 87a-102a. The "Order" appears at pp 98a-102a, supra.

(b)

The language at page 100a is direct, clear, definitive and, on its face shows that it rests on the full faith and credit clause of Article IV §1 of the Federal Constitution.

From any aspect said "Order" of December 5, 1979, was binding on both petitioner and respondent. It was not subject to approval by any party before the Court.

Patently, it directs compliance with the Judgment of the Supreme Court of the State of New York, dated May 1, 1978, in accordance with the provisions therein stated at the foot of the New York Decree, (Appendix D, page 35a), in petitioners' brief.

(c)

"People ex rel. Smith v. Kudler, dated July 9, 1979, cited in Respondent's brief (p. 9), is officially reported in 71 AD 2d 634. It is set forth herein as petitioners' Appendix "R", infra, p. 103a.

There is a twofold significance in the opinion dated July 9, 1979:

1. On its face it shows that the State of

New York exercises its jurisdiction over the subject matter at bar. Also, the Judgment of May 1, 1978, was affirmed twice by the Appellate Court, demonstrating the continuous jurisdiction relating to the Judgment dated May 1, 1978 (petitioners' brief, pp 19-20, 23-26, 75a-82a).

2. It effectively disposes of respondent's argument appearing at page 15, respondent's brief in opposition:

"...that New York had lost jurisdiction."

(d)

It cannot be gainsaid that Halvey v. Halvey, 330 U.S. 610, 614 (1974) cited at p. 8 in respondent's brief, is neither applicable nor controlling in the case at bar, viewed in the background facts set forth in People ex rel Smith, 71 AD 2d, 634, supra.

"Whether the principle of that case is applicable to this depends upon this consideration, whether the facts of that case are the same or of the same essential nature as the facts of this case. Legal principles spring from the essential facts of a case and it is not safe to apply the principle which controls the decision of one case to the decision of another case until the facts of the two cases have been closely compared and found to be essentially the same."
(Lorillard v. Clyde et al, 122 N.Y. 498, 502 (1890).)

(e)

On the other hand, the petitioners cited in its brief, (pp 57a-60a), the principle of law enunciated in Halvey v. Halvey, 330 U.S. 610, 614, which is operative and pertinent to the enforcement of the Judgment, dated May 1, 1978, supra. (Petitioners' Brief, pp 62a-63a).

(f)

Viewed in the background of the Hearing held on June 20, 1979, and considering the solemn oath made by respondent in answer to the

vital questions presented by Judge Kunzman (pages 23-25, petitioners' brief), it is arrant nonsense for the respondent to assert at page 8 in its brief in opposition to the petition for certiorari:

> "A change of residence, such as occurred in this case is a sufficient change of circumstances so as to require a New York Court to modify visitation provisions contained in an earlier order." (Emphasis supplied)

(g)

It is erroneous for respondent at page 15 of its brief to assert that 28 U.S.C. §1738A (Appendix "L", Petitioners' Brief) is inapplicable to the case at bar on the ground:

> "That statute was enated on December 28, 1980, long after this case was decided on June 13, 1980."

Patently, the judgment of the District Court is not a final judgment for purpose of applicability to 28 U.S.C. 1738A.

In view of the importance of 28 U.S.C. 1738A, to the cases as Halvey v. Halvey, cited by petitioners in its brief (pp 27-29), this Court may exercise its discretion and consider the applicability of the foregoing new federal statute as a substantial federal question affecting the judiciary in the 50 states. Cf.: Bradley v. Richmond School Board, 416 U.S. 696, 711; Halvey v. Halvey, 330 U.S. 610, 614, 619, 620; United States v. Alabama, 362 U.S. 602, 604; Zifferin, Inc. v. United States, 318 U.S. 73, 78; V.5B, C.J.S. Appeal and Error §1841, pp 244-245.

CONCLUSION

For the reasons stated hereinabove and in the petition, petitioners pray that the Petition for Certiorari be granted.

Respectfully submitted,

I. STANLEY STEIN
Attorney for Petitioners
1365 East 13th Street
Brooklyn, N.Y. 11230
(212) 376-1231

APPENDIX

APPENDIX Q

TRANSCRIPT OF DECEMBER 5, 1979 HEARING

IN THE DISTRICT COURT IN AND FOR THE

COUNTY OF JEFFERSON

STATE OF COLORADO

Civil Action No. 79DR3109, Div. 7

HARVEY KUDLER and MARCIA KUDLER, Petitioners, vs. MALLORY IRA SMITH, Respondent, And Regarding, BRIAN ALEXANDER SMITH and VANESSA LAUREN SMITH, Children.	REPORTER'S TRANSCRIPT Volume I

Cause comes on for hearing before the Court on Wednesday, the 5th of December, 1979, at the hour of 4:00 p.m., before Honorable Joseph P. Lewis, District Court Judge of Division 7, in and for the First Judicial

APPENDIX Q

District, County of Jefferson, State of Colorado.

A P P E A R A N C E S

MR. JERRY C. CONNELL and MR. SEYMOUR FRIEDMAN, Attorneys at Law, appeared on behalf of the Petitioners.

WHEREUPON, the following proceedings were had, to wit:

I N D E X

Stipulation re: Visitation

VOLUME I

December 5, 1979	Page
MR. CONNELL	2
MR. SMITH	5
MR. CONNELL	6
MR. FRIEDMAN	6
THE COURT	7

THE COURT: 79DR3109, Harvey and Marcia Kudler, Petitioners, versus Mallory Ira Smith, Respondent and regarding Brian Alexander and Vanessa Lauren Smith, children.

APPENDIX Q

MR. CONNELL: If the Court please, my name is Jerry Connell of the firm of Bohm, Connell & McLellan, registration number 2712, with Seymour Friedman, attorney, the State of Colorado, has been admitted for the practice of this case as co-counsel.

This matter comes on before the Court upon a return of two writs, one a writ of ne exeat and a writ of habeas corpus. I wish to thank the Court for the opportunity and graciousness that you have biven us in order to use this courtroom and this Court's facilities in arriving at an agreement which we hope may settle or begin settling the differences between these parties.

As explained to the Court earlier, this is a matter concerning the visitation of the grandparents of the Petitioners herein, which were vested in them by an order of the

APPENDIX Q

Supreme Court of the State of New York. The father, the Respondent, who is present here, has custody of the children, subject to that visitation.

We have discussed this matter outside the presence of the Court. I would like to offer to the Court, a stipulation which, for the Court's approval, and I would like to read it into the record and have the Court ask these parties if that is what they agree with the following provisions:

That Mr. Smith is not, does not have an attorney present with him, and that the matter b continued for a short period of time, several days, for him to consult with an attorney and to he can always ask the Court to reconsider this for certain reasons.

First, the parties offer this, number one that the children, the two minor children which are named in the petition, shall be returned to

APPENDIX Q

the State of New York for a period of thirty days during the summer, each summer period beginning in the summer of 1980. During that time the children shall spend fifteen days with the Petitioners and fifteen days with the paternal grandparents. The cost of such transportation shall be split fifty-fifty.

The second item will be that during -- the maternal grandparents, the Petitioners herein shall be entitled to visitation with the children in New York on alternate winter and spring school vacation breaks.

Now, if I may be a little bit more specific and define the winter break, would be that time when school is out for what is commonly known as the Christmas holidays, but the children would be sent to New York on the following Christmas and would be returned to Colorado on at least twenty-four hours before the school takes up in the following first week in January. It would

APPENDIX Q

be the duty of Mr. Smith to notify the grandparents of these dates. The Petitioners would cover the cost of that transportation. The spring break is the one that usually takes place in the vicinity of what's known as the Easter holidays. The children would be sent to New York within twenty-four hours of their getting out of school and would be returned at least twenty-four hours before school takes up during that break.

The reason we're not pinning that down is because these holidays sometimes drift back and forth and there's sometimes they have ten days, sometimes they have eight, sometimes they have more, we don't know, but the parties understand that we're talking about and should govern themselves accordingly.

Now, the grandparents should be allowed to write the children as often as they wish. Mr.

APPENDIX Q

Smith will keep the grandparents informed either directly or through me of their address, their whereabouts. The Petitioners shall be allowed to telephone, allowed reasonable rights of communicating with the children by telephone, and these rights shall not be abused. Reasonable can be determined as to what the circumstances are at the time, but in normal, ordinary course could be considered no more than once a week.

During that summer vacation, as we said before, Mr. Smith will notify the grandparents ninety days prior to the children arriving in New York, at least ninety days so they can make adequate plans and he can also coordinate with his summer vacation.

Furthermore, upon them coming to New York, Mr. Smith will provide the children and make sure that they take along sufficient clothing, toys, books, their possessions. These will be

returned with the children when they're returned. The Petitioners shall notify Mr. Smith in writing, also within that, within that ninety day period of activities that they intend to have the children do so. Mr. Smith can make provisions as far as clothing and other items.

As to the children, guaranteeing the children's return to Colorado, the Petitioners are willing to enter into a reasonable, and we ask the Court to be a minimal bond, because of their good faith in coming before this Court, which they would post with the Court prior to the visitation, to guarantee that the children will be returned to Colorado. We've discussed the matter with Mr. Smith, and we are aware of his financial means. He's informed us, and we believe he's telling us the truth that he does not have the wherewithal to post bond to guarantee the delivery of the children, so we

APPENDIX Q

would ask the Court to adopt what might possibly be an unusual approach. We ask the Court to continue this habeas corpus hearing from time to time, for an extensive period of time until we see how this works out to guarantee that the children would be available before this Court in the event that Mr. Smith were to disobey the orders of this Court. We also request that the writ of ne exeat be quashed.

When the children are with the Petitioners in New York, they are free to call the paternal grandparents, just as the children, when they're in New York with the paternal grandparents, are free to call the Petitioners, and during the Easter or winter or Christmas vacations, as the case may be.

THE COURT: And to visit with the maternal grandparents?

MR. CONNELL: Yes, Your Honor.

Nothing that we have read into the record

here shall prevent these parties from making, entering into any other agreement as may be agreed upon between the parties from time to time, but in the event that a dispute arises over its terms and condition, then what we have read into the record shall pertain to both of them and so long as whatever provisions are made are in the best interests of the children, so long as whatever changes are made are within the best interests of the children.

Does the Court have any questions?

MR. SMITH: I want something said, that as far as my employment is concerned, that the Kudlers should interfere in no way with my employment. That has to be in there.

MR. CONNELL: We will inform our clients of what their duties and what they are, and I will tell them what the laws of Colorado are, and should anything come about that causes you

problems in any way, you contact me first and I'll try my best to get it straightened out. That much I can do, I promise you. I don't think it has a place.

MR. FRIEDMAN: Let me just say this to the Court: I want to thank the Court, especially on the record. This has been a very long and arduous litigation, a litigation which has, unfortunately, it's nothing to brag about, but it has national notoriety. And I know the Court feels like I do, that the most important thing is the interests, are the interests of these children. This Court, by allowing the very lengthy consultation of many hours between the parties, the attorneys, allowing the children to partake in some of the parts of the conferences, and also by issuing a perfectly legal, but unusual and tedious remedy, has shown great concern for the interests of these children. And I think

APPENDIX Q

that the record should be clear that this Court -- well, I can't say we went beyond the call of duty, because that is the duty of the Court, but this Court exemplified my opinion of the highest and noblest traditions that is incumbent upon our courts to exhibit.

I also think that the Kudlers, who have traveled the breadth of this nation, physically, as well as telephonically in search of these beloved grandchildren, wish to thank the Court. And I also say that I thank the father of these children, who I am sure has undergone tremendous psychological and emotional pressure, and I think that the getting together of these people in this courtroom is not only a monumental accomplishment, but one which I hope will bring these children, above all, content-ment, peace and a little security forevermore. And I thank the Court, especially, as I do, so

APPENDIX Q

want to pay my especial thanks to one of the city's very fine attorneys that went way beyond the call of duty, and that's Mr. Connell. Thank you.

THE COURT: Mr. Smith, you've heard the stipulation and you agree to it?

MR. SMITH: Well, I would still have to speak to my attorney.

THE COURT: I understand that.

MR. SMITH: I agree to it.

THE COURT: As the provisions are made in the agreement, that you do have an opportunity, of course, to consult with counsel.

MR. SMITH: Uh-huh.

THE COURT: In this matter.

But other than that, the other terms you are in agreement with?

MR. SMITH: Right.

THE COURT: Is that correct?

APPENDIX Q

Now, I am going to say to both parties, in the interests of the children, the best interests of the children, that this Court is interested in, and neither of the parties, the Petitioner, Respondent in this case, will do anything to cause any difficulties with the children and not to make any remarks on anything to the children as against one of the other parties. That's not proper, and you'll alienate the children if you do so.

Furthermore, when the children are supposed to be returned from New York, they will be at that time. You are under order of this Court, and you will have to comply with the order. You are under orders from the Court in New York and they also will have jurisdiction so that you can not in any way violate the terms and conditions of the visitation, not in any manner. Mr. Smith's willing to comply, but

APPENDIX Q

when he sends the children back there, he has a right to expect them back at the time designated and not any later. The children have to get back to school, and it's important that they back in time, and so long as they're in New York and both grandparetns are there, that they have an opportunity to visit and call the maternal grandparents as well as the paternal grandparents, so if you comply with all of that, there shouldn't be any problems among you in the future. If you have any disagreements, bring it to me if you can't agree among yourselves.

Do you think you can live with that?

MR. SMITH: Thank you.

THE COURT: I think you all can. All right. Will you reduce that to writing?

MR. CONNELL: Yes, your Honor. And I believe I better have a transcript.

THE COURT: All right. And be sure

APPENDIX Q

Mr. Smith reads it and has an opportunity to approve it.

MR. CONNELL: I think I have got sufficient intention to get the guts of it. Some of the details, I didn't get, so I would like a transcript, if I may. On the other hand, I will reduce it, a tentative stipulation, provide it to Mr. Smith for him to consult with his attorney, and then he will, his attorney will get back to me with his response.

THE COURT: Very well. That order will provide the writ of ne exeat is dismissed and the habeas corpus will be continued from time to time until dismissed by the Court.

MR. CONNELL: Thank you, Your Honor.

APPENDIX R

71 AD 2d 634
July 9, 1979 - Second Dept.

25 THE PEOPLE OF THE STATE OF NEW YORK ex rel. MALLORY SMITH, Appellant, v HARVEY KUDLER et al., Respondents.—In a habeas corpus proceeding involving the custody of two children, the petitioner father appeals from a judgment of the Supreme Court, Queens County, entered February 15, 1979, which modified and increased the visitation granted to the respondents, grandparents of the children in question, in a prior judgment dated May 1, 1978. Judgment reversed, on the law, with $50 costs and disbursements, and the original visitation provisions are reinstated. In this custody proceeding between the petitioner, father of the two children involved, and the respondents, the parents of the mother, who is now dead, Special Term had previously awarded custody to the father but permitted visitation by the grandparents every other Sunday. That judgment was appealed from by the grandparents and affirmed by this court (*People ex rel. Smith v Kudler*, 66 AD2d 1035, mot for lv to app den 46 NY2d 709). The modification herein was made without a formal hearing. No sworn testimony was taken and no new findings of fact or conclusions of law were made. The parties were before the court on an application to punish the grandparents for contempt. There was no petition for modification of the visitation provisions of the judgment properly before the court at the time and no emergency requiring immediate removal of the children from the petitioner's home was shown. It is elementary that a judgment directing custody and visitation, recently entered by one Judge, should not be disturbed by another Judge of co-ordinate jurisdiction in the absence of a change in circumstances (*Powers v Powers*, 119 App Div 436; *Gould v Gould*, 261 App Div 904). The transcript of the proceedings shows that the court was aware of that rule when it modified the prior judgment but chose to proceed anyway. We hold this to be an improvident exercise of discretion. Even if a petition for modification had been before the court, it would have been error to modify the original visitation provisions without a hearing (cf. *Kresnicka v Kresnicka*, 48 AD2d 929). Suozzi, J. P., Cohalan, Margett and Martuscello, JJ., concur.